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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JOSE M. ATRIAN, Defendant and Appellant.	B201075 (Los Angeles County Super. Ct. No. GA065770)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rafael A. Ongkeko, Judge. Affirmed as modified.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews and Herbert S. Tetef, Deputy Attorneys General, for Plaintiff and Respondent.

Jose M. Atrian appeals from the judgment entered following his conviction by a jury for multiple sex offenses, two counts of making a criminal threat and six counts of first degree burglary. We modify the judgment to reflect the imposition of a single crime prevention fee and, as modified, affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Charges*

Atrian was charged in an amended information with four counts of committing lewd acts upon a child under the age of 14 years (Pen. Code, § 288, subd. (a))[1] (counts 1, 3, 7 and 13), four counts of forcible oral copulation (§ 288a, subd. (c)(2)) (counts 4, 8 ,10 and 12), three counts of oral copulation with a person under the age of 16 years by a person over the age of 21 years (§ 288a, subd. (b)(2)) (counts 16, 19 and 22) and three counts of committing lewd acts upon a child 14 or 15 years old by a person at least 10 years older (§ 288, subd. (c)(1)) (counts 15, 18 and 21). He was also charged with two counts of making a criminal threat (§ 422) (counts 2 and 6) and six counts of first degree burglary (§ 459) (counts 5, 9, 11, 14, 17 and 20). With respect to the burglary counts the amended information specially alleged a person other than an accomplice was present in the house. (§ 667.5, subd. (c).) It was further specially alleged Atrian had served a prison term for a prior felony conviction (§ 667.5, subd. (b)). Atrian pleaded not guilty and denied the special allegations.

2. *Summary of the Evidence Presented at Trial*

a. *The People's evidence of repeated sexual offenses and burglary*

Angelica H. moved from Mexico to Rosemead in September 2004 to live with her older brothers. Angelica, who was 12 years old at the time and not a United States citizen, began attending evening school to learn English. Sometime after Angelica turned 13 years old in January 2005, she and her brothers moved to an apartment in Arcadia across the street from a recycling center and grocery store. While her brothers were at work, Angelica stayed in the apartment, watching television, cooking and cleaning.

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[1] Statutory references are to the Penal Code unless otherwise indicated.

In late November 2005 Angelica took some bottles and cans to the recycling center. Atrian, who worked at the center, introduced himself to Angelica as Steve and asked her name and age. Angelica told him she was 13 years old; Atrian commented she was a "little girl." Angelica took her receipt for the bottles and cans, which she could exchange for cash at the grocery store, and left.

On December 1, 2005 Angelica returned to the recycling center to redeem more bottles and cans. Angelica testified Atrian, who this time said his name was David Elias Estrada, again asked her questions, including her name, age and where she lived. Angelica answered Atrian's questions because she thought he was a nice person. She told him she lived in apartment number four with her brothers, who worked during the day, and explained she did not go to school. After Angelica again told Atrian she was 13 years old, he repeated she was a "little girl." Atrian, who was 29 years old at the time, told Angelica he was 18 years old.

Atrian told Angelica he was 24 years old the third time she went to the recycling center. As Angelica was leaving, Atrian extended his hand as if he wanted to shake hands. When Angelica took Atrian's hand, he pulled her inside the recycling center shed, locked the door with a padlock, put his hand over her mouth and said he would kill her brothers if she tried to do or say anything. Atrian fondled Angelica under her clothing, then roughly tackled her, removed her clothing and forced her to have sexual intercourse with him. After he finished, Atrian gave Angelica his telephone number and told her to call him every day, threatening to kill her brothers if she did not comply. Angelica testified she called Atrian daily as he had instructed because she was afraid of him.

According to her testimony, Angelica opened the door of her apartment after hearing a knock about noon approximately one week later (December 7, 2005). Angelica tried to close the door when she saw Atrian standing there; but he forced his way into the apartment, again threatening to kill Angelica's brothers if she tried to do anything. Atrian removed his clothes, revealing numerous tattoos, and had sexual intercourse with Angelica. Angelica did not struggle because she was afraid; Atrian had threatened her and said he was a gang member. After Atrian ejaculated, he grabbed Angelica by the

hair, lowered her head toward his penis and forced her to orally copulate him, again threatening to kill Angelica's brother. Atrian left about five minutes later through the apartment's rear door, telling Angelica he had been in jail. Angelica called Atrian later that day as he had instructed her to do, and Atrian told her to leave the door and windows of her apartment open.

The next day, on or near December 8, 2005, Atrian appeared inside Angelica's apartment, frightening her. Atrian threatened Angelica and told her to get undressed. He then forced Angelica to orally copulate him -- pushing her head toward his penis -- had sexual intercourse with her and again forced her to orally copulate him before leaving through the apartment's rear door. Angelica had bruises on her neck from Atrian roughly kissing it. Angelica, however, did not tell anyone what had happened because she was scared. She once again called Atrian the next day as he had told her to do.

Angelica testified that on approximately December 17, 2005 she left the windows and doors open to the apartment after Atrian instructed her to do so in a telephone call in which he again threatened her. Atrian arrived at the apartment at 1:00 p.m., began kissing Angelica, again leaving bruises on her neck, had sexual intercourse with her and then forced her to orally copulate him. Atrian also demanded Angelica continue to call him every day.

Angelica turned 14 years old on January 3, 2006. Between that date and approximately January 26, 2006, Atrian repeated the pattern of coming to her apartment, having sexual intercourse with her and compelling her (by force or threats) to orally copulate him. On one occasion, when Angelica refused to perform oral sex, Atrian bit her cheek, hit her in the face with his fist and then forced her to perform oral sex. When Angelica's brothers confronted her about the marks on her face, she lied because she was afraid of Atrian and said she fell in the bathroom. Angelica continued to call Atrian daily during this time as he had demanded, and Atrian would occasionally remind Angelica he was in a gang and would kill her brothers if she did not comply with his orders.

On January 27, 2008 the police were called by Eliseo Lazcano, who lived in the apartment next door to Angelica and her brothers. Lazcano testified he had seen Atrian

approach women walking near the recycling center, including Lazcano's fiancée, and try to talk to them. After Lazcano saw Atrian leave a second time through the rear door of Angelica's apartment, he took Atrian's photograph, as well as a photograph of his car's license plate. Lazcano told Angelica's brother Pedro what he had observed and showed him the picture of Atrian. Pedro told Lazcano he and his brothers had all been concerned about Angelica because of the bruises and because she had become very quiet and did not want to leave the apartment. In fact, Pedro testified he and his brothers had bought a video camera to install in the apartment because they suspected something was happening notwithstanding Angelica's denials. Lazcano told Pedro he should call the police immediately and then did so on Pedro's behalf because Pedro did not speak English.

b. *The People's evidence of other sexual offenses committed by Atrian*

Judith Garcia testified she met Atrian almost 13 years earlier when she was 15 years old. Atrian, who was 19 at the time, had told Garcia he was 16. Garcia and Atrian began dating, and Garcia became pregnant after the first time they had intercourse. Although Garcia had broken off the relationship after they had had intercourse, when he found out she was pregnant, Atrian told Garcia he wanted her to have the baby and assured her he would "be there." After Garcia moved in with Atrian and his family, he became emotionally and physically abusive. He called Garcia derogatory names and forced her to have sex with him, telling Garcia it was her job. On occasion Atrian pulled Garcia's hair and pushed her head toward his penis; and, if she did not orally copulate him, he would hit her. Atrian threatened to punish Garcia and locked her in the house if she did not have sex with him; he also forbade Garcia to talk to her family or friends, only allowing Garcia to speak with her mother in his presence. Atrian's abuse continued for approximately four months until Garcia was able to move back to her family's house. Although Atrian lived with Garcia for a few weeks after the baby was born and he assured her he would change, Atrian again began to abuse her; and she reported him to the police.

Laura Escalante testified she was 22 years old in November 2005 when she met Atrian at the recycling center and he began flirting with her. Escalante gave Atrian her

telephone number after he insisted she do so, and they began dating after speaking on the telephone a few times. More than five times during sexual encounters, Atrian insisted Escalante perform oral sex, grabbing her head and pushing it toward his penis; he also told her on one occasion performing oral sex was a woman's job. Escalante explained she felt intimidated by Atrian and pressured to engage in sex because he had talked about his involvement with gangs, showing her his tattoos, and had said he spent time in jail and had been in a relationship where he had abused a girl.

c. *The defense's evidence*

Atrian contended he and Angelica had a consensual, romantic and sexual relationship and he did not know she was under 18 years old. According to Atrian, who testified on his own behalf at trial, he met Angelica's mother, who periodically visited from Mexico, in November 2005 at the recycling center before he met Angelica. Angelica's mother told him Angelica was attracted to him and said she wanted to introduce Angelica to him. When they met, Angelica told Atrian she was 18 years old, although Atrian thought she looked only 16 or 17 years old. Later that week, according to Atrian, Angelica visited him at the recycling center; and, while she was showing him pictures of friends she kept in her wallet, Atrian saw her gym membership card, a California identification in the name of Maria R. -- the name Atrian said Angelica used with him -- that had a birth date of December 3, 1987 and a card from the night school Angelica attended.[2]

Atrian testified he and Angelica began a romantic relationship that lasted about two months. Atrian claimed he never threatened Angelica or forced her to have sex. With respect to his tattoos, he had explained to Angelica he belonged to a gang a long

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[2] Atrian claimed Angelica used her older sister's name, Maria R., when he was with her. However, in a telephone call Angelica made to Atrian, which was monitored by the police, Atrian referred to Angelica as "Angelica," not "Maria," several times. Angelica acknowledged in her testimony she had a membership card for the gym in Maria R.'s name but with Angelica's picture on it. Angelica said she never showed the card to Atrian.

time ago, but had "converted to Jesus." He also testified he was friends with Angelica's brothers, had eaten meals with them at their apartment and, on one occasion, one of Angelica's bothers was in the apartment when he and Angelica had sex.

Atrian also testified that, after he was fired from his job at the recycling center on January 26, 2006, he told Angelica their relationship had to end because he was uncomfortable having a sexual relationship outside of marriage. Angelica, who was angry and suspected he wanted to be with another woman, told Atrian she was going "to get" him. After Atrian asked what she meant, Angelica said she had "a way to do it."

Atrian acknowledged he had been convicted in 1997 of corporal injury to a spouse or cohabitant (Garcia) and possession of a firearm by a felon.

3. *The Trial Court's Mistake-of-age Instruction*

Prior to submitting the case to the jury, the court denied Atrian's request for an instruction he would not be guilty of committing lewd acts upon a child under the age of 14 years if he reasonably believed Angelica was over the age of 18 years. The court denied the request based on *People v. Olsen* (1984) 36 Cal.3d 638 (*Olsen*) [good faith belief as to age of victim is not a defense to charge of violation of § 288]. In connection with the charges for oral copulation of a person under the age of 16 years by a person over the age of 21 years (§ 288a, subd. (b)(2)), however, the jury was instructed, "The defendant is not guilty of this crime if he reasonably and actually believed that the other person was age 18 or older. The People must prove beyond a reasonable doubt that the defendant did not reasonably and actually believe that the other person was at least 18 years old. If the People have not met this burden, you must find the defendant not guilty of this crime."

4. *The Jury's Verdict and Sentencing*

The jury found Atrian guilty of all the crimes charged except count 12, forcible oral copulation (§ 288a, subd. (c)(2)) on December 17, 2005, instead finding Atrian guilty of oral copulation with a person under the age of 14 years (§ 288a, subd. (c)(1)), submitted to the jury as a lesser included offense. With respect to the burglary charges,

the jury found true the special allegation a person other than an accomplice was present during the commission of the offense.[3]

The court sentenced Atrian to an aggregate state prison term of 36 years consisting of the upper term of eight years for count one, committing a lewd act upon a child under the age of 14 years, and consecutive subordinate terms totaling 28 years for nine other sexual offenses -- three of which were full-term consecutive sentences pursuant to section 667.6. Concurrent terms were imposed for the remaining four sexual offenses "in light of the aggregate sentence." Sentences for the six counts of burglary and two counts of making a criminal threat were stayed pursuant to section 654. The court also imposed various fees, fines and assessments, including a $10 crime prevention fee for each of the six burglary offenses for a total of $60 in crime prevention fees (§ 1202.5, subd. (a)).

CONTENTIONS

Atrian contends he was entitled to an instruction that mistake of fact is a defense to the crime of committing lewd acts upon a child under the age of 14 years and the trial court erred in admitting evidence of prior sexual offenses he had committed. Atrian also contends, the People concede and we agree the court erred in imposing six $10 crime prevention fees for the burglary offenses, as opposed to a single $10 fee.[4] Accordingly the judgment is modified to reflect imposition of a single $10 crime prevention fee.[5]

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[3] The special allegation Atrian had served a prior prison term for a felony conviction was dismissed at the People's request pursuant to section 1385 before the jury returned with its verdicts.

[4] Section 1202.5, subdivision (a), provides in part, "In any case in which a defendant is convicted of any of the offenses enumerated in Section 211, 215, 459, 470, 484, 487, 488, or 594, the court shall order the defendant to pay a fine of ten dollars ($10) in addition to any other penalty or fine imposed." Only one such fee may be imposed in a case regardless of the number of qualifying convictions. (See *People v. Crittle* (2007) 154 Cal.App.4th 368, 371 ["[T]he crime prevention fine can be imposed only once '[i]n any case.' [Citation.] Although defendant was accused and convicted of committing multiple offenses, this was still a single case."].)

[5] The abstract of judgment incorrectly labels the crimes in counts 12 through 18 although it identifies the correct code sections. The crimes should be identified as

DISCUSSION

1. *A Reasonable Mistake As to the Victim's Age Is Not a Defense to a Charge of Committing Lewd Acts upon a Child Under the Age of 14 Years*

In *Olsen, supra,* 36 Cal.3d at page 647 the Supreme Court held "a reasonable mistake of age is not a defense to a section 288 charge" of committing lewd acts upon a child under the age of 14 years. Distinguishing *People v. Hernandez* (1964) 61 Cal.2d 529, in which the Court had "overruled established precedent, and held that an accused's good faith, reasonable belief that a victim was 18 years or more of age was a defense to a charge of statutory rape" (*Olsen,* at pp. 642-643, fn. omitted), the *Olsen* Court explained, "There exists a strong public policy to protect children of tender years [that is, under 14 years of age]. As [*People v. Gutierrez* (1978) 80 Cal.App.3d 829] indicates, section 288 was enacted for that very purpose. [Citations.] Furthermore, even the *Hernandez* court recognized this important policy when it made clear that it did not contemplate applying the mistake of age defense in cases where the victim is of 'tender years.'" (*Olsen,* at p. 646.) In support of its decision, the *Olsen* Court cited a number of legislative provisions demonstrating "[t]ime and time again, the Legislature has recognized that persons under 14 years of age are in need of special protection. This is particularly evident from the provisions of section 26. That statute creates a rebuttable presumption that children under the age of 14 are incapable of knowing the wrongfulness of their actions and, therefore, are incapable of committing a crime. A fortiori, when the child is a victim, rather than an accused, similar 'special protection,' not given to older teenagers, should be afforded. By its very terms, section 288 furthers that goal." (*Olsen,* at pp. 647-648, fn. omitted.)

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count 12 -- oral copulation with a person under the age of 14 years; count 13 -- lewd acts upon a child under the age of 14 years; count 14 -- first degree burglary with a person present; count 15 -- lewd acts upon a child 14 or 15 years old; count 16 -- oral copulation with a person under the age of 16 years; count 17 -- first degree burglary with a person present; count 18 -- lewd acts upon a child 14 or 15 years old. The abstract of judgment prepared to reflect the modification of the judgment should also correct these errors.

Atrian contends *Olsen* is distinguishable because in that case, as well as in many of the cases on which it relied, none of the defendants had presented evidence he reasonably believed the victim was 18 years old (as opposed to simply being older than 14 years). Atrian argues that, while he "agrees that the deliberate exploitation of naive females should not be tolerated when there is no reasonable basis for believing such a female is not the age of consent," those public policy considerations are inapplicable when the defendant has a reasonable belief, as he testified he did, the victim is 18 years old. Atrian also argues strict liability crimes are disfavored, and the requirement in section 288, subdivision (a), that the accused "willfully" commit a lewd act upon a child under 14 years of age includes the requirement the defendant intend to commit the act on a person of or under that age.

Atrian's attempt to distinguish *Olsen* is not persuasive. It is abundantly clear from the decision that the "strong public policy to protect children under 14" recognized by the Supreme Court is not dependent on the defendant's belief as to the child's age -- whether the belief is that the victim is older than 14 years but younger than 18 years or that the victim has turned 18 years old. As the Court stated, "The legislative purpose of section 288 would not be served by recognizing a defense of reasonable mistake of age. Thus, one who commits lewd or lascivious acts with a child, even with a good faith belief that the child is 14 years of age *or older*, does so at his or her peril." (*Olsen*, *supra*, 36 Cal.3d at p. 649, italics added.) If the Court had intended an exception for a defendant who reasonable believed the child was 18 years of age or older, it certainly would not have expressed its views in such categorical terms. Indeed, while the law may disfavor strict liability crimes, in the case of the exploitation or victimization of children and young teens exceptions are not unusual. (See *People v. Paz* (2000) 80 Cal.App.4th 293, 297 [mistake of age is not a defense to charge of lewd act committed upon a person 14 or 15 years of age by a person 10 years older under § 288, subd. (c)(1)]; cf. *People v. Williams* (1991) 233 Cal.App.3d 407, 409 [mistake of age is not a defense to charge of furnishing a controlled substance to a minor].)

In any event, in this case the trial court instructed the jury Atrian's reasonable belief Angelica was 18 years old was a defense to the three counts charging Atrian with violating section 288a, subdivision (b)(2), oral copulation of a person under 16 years old by a person over the age of 21 (counts 16, 19 and 22). The jury found Atrian guilty on each of these counts, clearly rejecting his claim he believed in good faith Angelica was 18 years old. Accordingly, even it if were error to refuse the mistake-of-age instruction on the other sex charges, any such error was harmless whether prejudice is measured by the *Chapman* beyond-a-reasonable-doubt standard (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]) or under *People v. Watson* (1956) 46 Cal.2d 818, 836 [reversal not required unless "it is reasonably probable that a result more favorable to the appealing party would have been reached in absence of the error"].

2. *The Trial Court Did Not Err in Admitting Evidence of Atrian's Prior Sexual Offenses*

Notwithstanding the general rule precluding predisposition evidence (see Evid. Code, § 1101), Evidence Code section 1108[6] authorizes use of evidence of the commission of other sexual offenses to prove the defendant's propensity to commit a charged sexual offense provided the evidence is not inadmissible under Evidence Code section 352.[7] (*People v. Falsetta* (1999) 21 Cal.4th 903, 911; *People v. Walker* (2006) 139 Cal.App.4th 782, 796-797.) "By reason of [Evidence Code] section 1108, trial courts may no longer deem 'propensity' evidence unduly prejudicial per se, but must engage in a careful weighing process under [Evidence Code] section 352. Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as

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[6] Evidence Code section 1108, subdivision (a), provides, "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."

[7] Evidence Code section 352 provides, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*Falsetta*, at pp. 916-917.)

We review the trial court's decision to admit evidence of prior sex offenses for an abuse of discretion. (*People v. Wesson* (2006) 138 Cal.App.4th 959, 969.) A trial court abuses its discretion when its ruling "'falls outside the bounds of reason.'" (*Ibid.*; see *People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10 ["trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice"].)

Atrian contends the trial court abused its discretion in admitting Garcia's testimony because any sexual offenses he committed against her were too remote in time[8] and the nature of his relationship with Garcia was too dissimilar because their sexual activity was consensual, at least until Garcia became pregnant, unlike the relationship with Angelica, which was allegedly coercive from the outset.

Unlike Evidence Code section 1109, which establishes a presumptive 10-year limit on the admissibility of prior acts of domestic violence to show the defendant's

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[8] It is unclear from the record exactly when the events described by Garcia occurred. Garcia testified she met Atrian almost 13 years before her testimony and shortly thereafter became pregnant. The abuse she described, therefore, would have occurred in 1994 or 1995. In his motion in limine to exclude Garcia's testimony, Atrian asserted the acts had occurred seven to eight years prior to the charged crimes, which would be in 1997 or 1998. However, Atrian testified he was convicted in 1997 of corporal injury to a spouse or cohabitant, a charge based on his abuse of Garcia. Accordingly, the acts probably occurred approximately 10 years before the charged offenses. The precise age of Atrian's prior sexual offenses is not material to our analysis of the admissibility of Garcia's testimony.

propensity to commit the charged acts of domestic violence,[9] Evidence Code section 1108 does not have a time limit establishing a default definition for remoteness nor is there a bright-line rule enunciated in the case law. (See *People v. Soto* (1998) 64 Cal.App.4th 966, 991 ["the passage of a substantial length of time does not automatically render the prior incidents prejudicial"].) For example, in *People v. Branch* (2001) 91 Cal.App.4th 274, 285, a 30-year gap between the prior acts and the charged offenses was not too great to render the prior acts inadmissible in light of the similarity between the prior acts and charged offenses. (*Ibid.* ["In theory, a substantial gap between the prior offenses and the charged offenses means that it is less likely that the defendant had the propensity to commit the charged offenses. However, . . . significant similarities between the prior and the charged offenses may 'balance[] out the remoteness.'"].) Similarly, in *People v. Waples* (2000) 79 Cal.App.4th 1389, 1393 to 1395 uncharged sexual offenses that had been committed against a young girl during a seven-year period 15 to 22 years prior to trial were held not too remote, in part because of the similarities between the prior offenses and charged acts. (See also *People v. Soto*, *supra*, 64 Cal.App.4th at pp. 977-978, 991 [evidence of molestations that had occurred 22 and 30 years prior to trial properly admitted].)

Ten- or eleven-year-old prior offenses are well within the age range courts have deemed admissible, with older offenses requiring some greater degree of similarity to the charged offenses. The requisite similarity exists in this case. To be sure, Atrian contends the nature of his relationship with Garcia differed from the one he had with Angelica because Garcia initially consented to sexual activity. However, the relevant comparison is between the sexual offenses, not what may have transpired before they were committed. Garcia testified Atrian forced her to orally copulate him by pulling her head toward his penis and hitting her if she refused, conduct strikingly similar to the charged offenses, which included allegations Atrian compelled Angelica to orally copulate him by

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[9] Evidence Code 1109, subdivision (e), provides, "Evidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice."

forcing her head to his penis and both biting and striking her in the face when she refused. The trial court did not abuse its discretion in concluding Atrian's consistent behavior -- threatening and physically abusing his victims so they would sexually gratify him -- outweighed any remoteness concerns.

Atrian also contends the trial court abused its discretion in admitting Escalante's testimony, arguing it was irrelevant because Escalante was well over the age of consent and there was no evidence he used force or threats of force such that his conduct would qualify as a sexual offense under Evidence Code section 1108, subdivision (d).[10] Atrian, however, ignores Escalante's testimony he insisted over her protestations she orally copulate him, grabbing her head and pushing it toward his penis, as he did with both Angelica and Garcia, on multiple occasions. This conduct qualifies as a sexual offense under both section 288a, subdivision (c)(2), forcible oral copulation -- one of the specific Penal Code provisions enumerated in Evidence Code section 1108, subdivision (d)(1)(A) -- and Evidence Code section 1108, subdivision (d)(1)(D). Whether Escalante was over

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[10] Evidence code section 1108, subdivision (d)(1), defines "sexual offense" as "a crime under the law of a state or of the United States that involved any of the following: [¶] (A) Any conduct proscribed by Section 243.4, 261, 261.5, 262, 264.1, 266c, 269, 286, 288, 288a, 288.2, 288.5, or 289, or subdivision (b), (c), or (d) of Section 311.2 or Section 311.3, 311.4, 311.10, 311.11, 314, or 647.6, of the Penal Code. [¶] (B) Any conduct proscribed by Section 220 of the Penal Code, except assault with intent to commit mayhem. [¶] (C) Contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person. [¶] (D) Contact, without consent, between the genitals or anus of the defendant and any part of another person's body. [¶] (E) Deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person. [¶] (F) An attempt or conspiracy to engage in conduct described in this paragraph."

Evidence Code section 1108, subdivision (d)(2), defines consent as having the same meaning as provided in section 261.6: "[P]ositive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved. [¶] A current or previous dating or marital relationship shall not be sufficient to constitute consent where consent is at issue in a prosecution under" enumerated sections of the Penal Code.

the age of consent is not a difference that militates against admission of the evidence of an otherwise similar prior sexual offense committed by Atrian.

Finally, the evidence of Atrian's prior sexual offenses against both Garcia and Escalante was markedly less inflammatory than the charged offenses, yet another factor weighing in favor of its admission. (See *People v. Harris* (1998) 60 Cal.App.4th 727, 737-738 [extremely inflammatory nature of evidence of prior sexual offenses weighed sharply in favor of exclusion]; *People v. Soto, supra*, 64 Cal.App.4th at p. 991 ["[t]he testimony of Linda and Raquel did not involve the same type of brutal, inflammatory conduct found prejudicial in *People v. Harris, supra*, 60 Cal.App.4th 727"]; cf. *People v. Rucker* (2005) 126 Cal.App.4th 1107, 1119 ["[r]elevant factors in determining prejudice include whether the prior acts of domestic violence were more inflammatory than the charged conduct"].)[11]

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[11] The trial court also admitted Garcia's and Escalante's testimony under Evidence Code section 1101, subdivision (b), permitting evidence of prior acts to prove some fact other than the defendant's predisposition to commit the offense charged, including motive and intent. Because we do not find error in admitting the testimony under Evidence Code section 1108, we need not address whether it was also admissible under Evidence Code section 1101. (See *People v. Walker*, *supra*, 139 Cal.App.4th at p. 797 ["[b]ecause the trial court allowed evidence of Walker's prior sexual assaults under both [Evidence Code] section 1101, subdivision (b), and section 1108, we can find error in its admission only if the testimony was inadmissible under both sections"].)

DISPOSITION

The judgment is modified to reflect the imposition of a single, $10 crime prevention fee pursuant to section 1202.5, subdivision (a). As modified, the judgment is affirmed. The superior court is directed to prepare a corrected abstract of judgment and forward it to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.